

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EMANUEL L. BOONE,
Plaintiff,
vs.
GARCIA, et al.,
Defendants.

1:23-cv-00173-GSA-PC

**ORDER FOR CLERK TO RANDOMLY
ASSIGN A UNITED STATES DISTRICT
JUDGE TO THIS CASE**

AND

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE
BE DISMISSED FOR PLAINTIFF'S
FAILURE TO OBEY COURT ORDER
(ECF No. 4.)**

**OBJECTIONS, IF ANY, DUE ON OR
BEFORE APRIL 25, 2023**

On February 6, 2023, the Court sent Plaintiff an order requiring Plaintiff to complete and submit the Court's consent/decline form (to consent to or decline magistrate judge jurisdiction in this case), within thirty days. (ECF No. 4.) The thirty-day time period has now expired and Plaintiff has not submitted a consent/decline form to the Court or otherwise responded to the Court's order.

In determining whether to dismiss this action for failure to comply with the directives set forth in its order, "the Court must weigh the following factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of

prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

“The public’s interest in expeditious resolution of litigation always favors dismissal,” *id.* (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the action has been pending since February 6, 2023. Plaintiff’s failure to respond to the Court’s order may reflect Plaintiff’s disinterest in prosecuting this case. In such an instance, the Court cannot continue to expend its scarce resources assisting a litigant who will not help himself by litigating his lawsuit and complying with Court orders. Thus, both the first and second factors weigh in favor of dismissal.

Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and of itself to warrant dismissal.” *Id.* (citing Yourish at 991). However, “delay inherently increases the risk that witnesses’ memories will fade and evidence will become stale,” *id.*, and it is Plaintiff’s failure to file the Second Amended Complaint that is causing delay. Therefore, the third factor weighs in favor of dismissal.

As for the availability of lesser sanctions, at this stage in the proceedings there is little available to the Court which would constitute a satisfactory lesser sanction while protecting the Court from further unnecessary expenditure of its scarce resources. Plaintiff is proceeding *pro se* and *in forma pauperis* in this action, making monetary sanctions of little use, and given the early stage of these proceedings, the preclusion of evidence or witnesses is not available. However, inasmuch as the dismissal being considered in this case is without prejudice, the Court is stopping short of issuing the harshest possible sanction of dismissal with prejudice.

Finally, because public policy favors disposition on the merits, this factor will always weigh against dismissal. *Id.* at 643.

Accordingly, the Court **HEREBY RECOMMENDS** that this action be dismissed based on plaintiff’s failure to comply with the court’s order issued on February 6, 2023. These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **On or before April 25, 2023**, Plaintiff

1 may file objections to the findings and recommendations, Plaintiff may file written objections
2 with the court. Such a document should be captioned “Objections to Magistrate Judge's Findings
3 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
4 time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39,
5 No. 11-17911, 2014 WL 6435497, at *3 (9th Cir. Nov. 18, 2014) (citing Baxter v. Sullivan, 923
6 F.2d 1391, 1394 (9th Cir. 1991)).

7
8 IT IS SO ORDERED.

9 Dated: March 31, 2023

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE